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Fantasy Ruby Sdn Bhd v Padiberas Nasional Bhd

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HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 22NCVC-559–10 OF 2015
FAIZAH JAMALUDIN JC
18 MAY 2018

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Competition Law — Competition Act 2010 — Anti-competitive practices — Plaintiff and defendant entered into contract for importation of broken rice — Defendant terminated contract — Whether contract in breach of ss 4 and 10 of the Competition Act 2010 — Whether contract null, void and unenforceable — Competition Act 2010 ss 4 & 10

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Contract — Termination — Validity — Plaintiff and defendant entered into contract for importation of broken rice — Defendant terminated contract — Whether contract in breach of ss 4 and 10 of the Competition Act 2010 — Whether contract was entered for plaintiff to avoid paying customs duty — Whether contract null, void and unenforceable — Whether termination of contract invalid and unlawful — Whether plaintiff entitled to specific performance and general damages

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On 21 July 2010, the plaintiff and the defendant entered into a contract for the importation of broken rice. Upon the expiry of the said contract, the plaintiff vides a letter ('the 2011 approval letter') from the Ministry of Agriculture and Agrobased Industry's ('MOA') obtained a further approval from the MOA to import broken rice for a period of ten years. Pursuant to the 2011 approval letter, the plaintiff and the defenda nt then entered into a contract dated 20 April 2011 for the importation of broken rice ('2011 broken rice contract'). On or around 18 September 2012, the Government of Malaysia ('GOM') and the defendant executed the 2012 concession agreement. Upon a request by the defendant, the plaintiff had obtained a further approval ('the 2012 MOA approval letter') from the MOA for importation of broken rice. Subsequently, via a letter dated 20 November 2013 ('the termination letter'), the defendant terminated the 2011 broken rice contract. The termination was made pursuant to cl 9.3 of the 2011 broken rice contract. The express reason given by the defendant for terminating the 2011 broken rice contract was that since none of the conditions stipulated in the 2012 concession agreement had arisen, the defendant had the right to terminate the 2011 broken rice contract with immediate effect. In the present action, the plaintiff sought a declaration that the defendant's termination of the 2011 broken rice contract was unlawful. The plaintiff further claimed for specific performance and general damages

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against the defendant. The issues for the court's determination were: (a) whether the 2011 broken rice contract was null, void and unenforceable by reason of the breach of the Competition Act 2010 ('the Act') and non-payment of customs duty; (b) whether the defendant's termination of the 2011 broken rice contract was invalid and unlawful; and (c) whether the plaintiff was entitled to specific performance and general damages resulting from the wrongful termination.

Held:

(1) The contract was not an agreement with the object of fixing prices; sharing markets or sources of supply; limiting or controlling production, market outlets or market access, technical or technological development or investment; or bid-rigging. The contract was a 'vertical agreement' between the plaintiff and the defendant; and both parties did not operate in the same market. No evidence was adduced during the trial as to whether they were competitors in the same market. Neither was any evidence adduced as to what the plaintiff's and defendant's market shares were in their respective relevant markets. Therefore, pursuant to the MYCC Guidelines on Anti-Competitive Agreements, the contract would not be considered to have a 'significant' impact under the Act. Based on the above, the contract was not an anti-competitive agreement and was not in breach of s 4 of the Act (see para 35).

(2) The defendant did not plead and adduce any evidence to prove that either or both the plaintiff and/or the defendant had dominant positions in their respective markets or that either had abused their dominant position by entering into the contract. Accordingly, the defendant had failed to prove on a balance of probabilities that either the plaintiff or the defendant had breached s 10 of the Act in entering into the contract (see paras 40–41 & 43).

(3) Only the defendant had the right to import rice into Malaysia. The plaintiff had to enter into the said contract with the defendant for the latter to facilitate the importation of broken rice. As such, the defendant's submission that the object and purpose of the said contract was for the plaintiff to avoid paying customs duty was devoid of merit. In totality, based on the above findings, the contract was not null, void and unenforceable pursuant to the Contracts Act 1950; and accordingly, the said contract was a valid and binding agreement on the parties (see paras 52–53).

(4) The MOA had confirmed in the 2012 MOA approval letter that it had no objections for the plaintiff to sign a fresh agreement with the defendant for the importation of 5,000 metric ton per month of broken rice for a period of ten years. Therefore, the termination pursuant to cl 9.3 of the 2011 broken rice contract was without basis. Further, the express reason

stated in the termination letter did not give rise for the defendant a right to invoke cl 9.3 of the 2011 broken rice contract. For the above reasons, the termination of the 2011 broken rice contract was invalid and unlawful (see paras 66, 68–69 & 75).

(5) The defendant in breach of the express terms of the 2011 broken rice contract refused to enter into the fresh agreement with the plaintiff and unlawfully terminated the 2011 broken rice contract. Based on the above finding, the court held that the plaintiff was entitled to the relief of specific performance. The court ordered the defendant to enter into a fresh agreement with the plaintiff on the terms of the 2011 broken rice agreement (see paras 79 & 85).

(6) Under the terms of the 2011 broken rice contract, the plaintiff had to purchase the rice from suppliers overseas and make the necessary shipping arrangements to ship the broken rice to Malaysia. Therefore, it would have suffered loss and damages as a result of the unlawful termination of the 2011 broken rice contract. Based on the above findings, the court found that specific performance was not sufficient to do justice for the defendant's breach of the 2011 broken rice contract. Accordingly, the court awarded general damages to the plaintiff. The court further awarded costs amounting to RM25,000 to the plaintiff subject to the payment of the allocator fee (see paras 83 & 86–87).

[Bahasa Malaysia summary

Pada 21 Julai 2010, plaintif dan defendan telah memasuki kontrak untuk pengimportan beras pecah. Selepas luput tempoh kontrak tersebut, plaintif melalui surat ('surat kelulusan 2011') dari Kementerian Industri Pertanian dan Asas Tani ('MOA') telah memperolah kelulusan selanjutnya dari MOA untuk mengimport beras pecah bagi tempoh sepuluh tahun. Menurut surat kelulusan 2011, plaintif dan defendan kemudian memasuki kontrak bertarikh 20 April 2011 untuk pengimportan beras pecah ('kontrak beras pecah 2011'). Pada atau sekitar 18 September 2012, Kerajaan Malaysia ('KM') dan defendan telah menyempurnakan perjanjian konsesi 2012. Atas permohonan defendan, plaintif telah memperoleh kelulusan selanjutnya ('surat kelulusan MOA 2012') dari MOA untuk pengimportan beras pecah. Berikutan itu, melalui surat bertarikh 20 November 2012 ('surat penamatan'), defendan telah menamatkan kontrak beras pecah 2011 itu. Penamatan itu dibuat menurut klausa 9.3 kontrak beras pecah 2011. Sebab nyata yang diberikan oleh defendan untuk menamatkan kontrak beras pecah 2011 adalah oleh kerana tiada syarat yang dinyatakan dalam perjanjian konsesi 2012 timbul, defendan mempunyai hak untuk menamatkan kontrak beras pecah 2011 dengan serta merta. Dalam tindakan ini, plaintif memohon suatu deklarasi bahawa penamatan defendan terhadap kontrak beras pecah 2011 itu adalah menyalahi undang-undang. Plaintif selanjutnya menuntut pelaksanaan spesifik dan ganti rugi am terhadap defendan. Isu-isu untuk ditentukan mahkamah adalah: (a)

A sama ada kontrak beras pecah 2011 itu terbatal, tidak sah dan tidak boleh dikuatkuasakan disebabkan pelanggaran Akta Persaingan 2010 ('Akta tersebut') dan duti kastam yang tidak berbayar; sama ada penamatan defendan terhadap kontrak beras pecah 2011 tidak sah dan menyalahi undang-undang; dan (c) sama ada plaintif berhak kepada pelaksanaan spesifik dan ganti rugi B akibat penamatan yang salah itu.

Diputuskan:

(1) Kontrak tersebut bukan suatu perjanjian dengan tujuan menetapkan C harga; berkongsi pasaran atau sumber bekalan; mengehadkan atau mengawal pembuatan, saluran pasaran atau akses pasaran, pembangunan teknikal atau teknologi atau pelaburan; atau bidaan. Kontrak tersebut adalah suatu' vertical agreement' antara plaintif dan defendan; dan kedua-dua pihak tidak beroperasi dalam pasaran yang sama. Tiada D keterangan dikemukakan semasa perbicaraan tentang sama ada mereka adalah pesaing dalam pasaran yang sama. Juga tiada apa-apa keterangan tentang pasaran saham plaintif dan defendan dalam pasaran berkaitan mereka masing-masingnya. Oleh itu, menurut Garis Panduan MYCC berhubung Perjanjian Anti-Persaingan, kontrak tersebut tidak boleh E dianggap sebagai mempunyai impak yang 'significant' di bawah Akta tersebut. Berdasarkan di atas, kontrak tersebut bukan perjanjian anti-persaingan dan tidak melanggar s 4 Akta tersebut (lihat perenggan 35).

(2) Defendan tidak mempli dan mengemukakan apa-apa keterangan untuk F membuktikan sama ada plaintif dan atau defendan mempunyai kedudukan yang dominan dalam pasaran mereka masing-masingnya atau antara mereka telah menyalahgunakan kedudukan dominan mereka dengan memasuki kontrak tersebut. Sewajarnya, defendan telah gagal untuk membuktikan atas imbangan kebarangkalian bahawa plaintif atau G defendan telah melanggar s 10 Akta tersebut dengan memasuki kontrak tersebut (lihat perenggan 40–41 & 43).

(3) Hanya defendan mempunyai hak untuk mengimport beras ke dalam Malaysia. Plaintif telah memasuki kontrak tersebut dengan defendan H untuk memudahkan pengimportan beran pecah itu. Oleh itu, hujah defendan bahawa tujuan dan maksud kontrak tersebut adalah untuk plaintif mengelak daripada membayar duti kastam adalah tidak bermerit. Secara keseluruhan, berdasarkan dapatan di atas, kontrak tersebut adalah tidak terbatal, tidak sah dan tidak boleh dikuatkuasakan menurut Akta I Kontrak 1950; dan sewajarnya, kontrak tersebut adalah perjanjian yang sah dan mengikat ke atas pihak-pihak (lihat perenggan 52–53).

(4) MOA telah mengesahkan dalam surat kelulusan MOA 2012 bahawa ia tiada bantahan untuk plaintif menandatangani perjanjian baharu dengan defendan bagi pengimportan 5,000 tan matrik beras pecah setiap bulan

untuk tempoh sepuluh tahun. Oleh demikian, penamatan menurut klausa 9.3 kontrak beras pecah 2011 adalah tanpa asas. Selanjutnya, sebab jelas yang dinyatakan dalam surat penamatan itu tidak memberikan hak kepada defendan untuk menggunakan fasal 9.3 kontrak beras pecah 2011 itu. Berdasarkan sebab-sebab di atas, penamtan kontrak beras pecah 2011 adalah tidak sah dan menyalahi undang-undang (lihat perenggan 66, 68–69 & 75).

(5) Defendan yang telah melanggar terma-terma nyata kontrak beras pecah 2011 enggan memasuki perjanjian baharu dengan plaintif dan telah menamatkan kontrak beras pecah 2011 yang menyalahi undang-undang. Berdasarkan dapatan di atas, mahkamah memutuskan bahawa plaintif berhak mendapat relief untuk pelaksanaan spesifik. Mahkamah memerintahkan defendan memasuki perjanjian baharu dengan plaintif atas terma-terma perjanjian beras pecah 2011 (lihat perenggan 79 & 85).

(6) Di bawah terma-terma kontrak beras pecah 2011, plaintif perlu membeli beras daripada pembekal luar negara dan membuat urusan penghantaran yang perlu untuk menghantar beras pecah ke Malaysia. Oleh demikian, ia akan mengalami kehilangan dan kerugian akibat penamatan kontrak beras pecah 2011 yang menyalahi undang-undang itu. Berdasarkan dapatan di atas, mehakmah mendapati bahawa pelaksanaan spesifik tidak mencukupi untuk berlaku adil terhadap pelanggaran kontrak beras pecah 2011 oleh defendan. Sewajarnya, mahkamah telah mengawardkan ganti rugi am kepada plaintif, mahkamah selanjutnya mengawardkan kos berjumlah RM25,000 kepada plaintif tertakluk kepada bayaran fi alokatur (lihat perenggan 83 & 86–87).]

Notes

For cases on validity, see 3(4) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 7563–7579.

Cases referred to

China Road & Bridge Corp & Anor v DCX Technologies Sdn Bhd and another appeal [2014] 5 MLJ 1; [2014] 7 CLJ 644, CA (refd)

DC Contractor Sdn Bhd v Universiti Pertahanan Nasional Malaysia [2014] 11 MLJ 633; [2015] 2 CLJ 946; [2014] AMEJ 0764, HC (refd)

DSL Development Corp Sdn Bhd v Kampong Kita Sdn Bhd [2014] 11 MLJ 935; [2013] 2 ACMR 197, HC (refd)

Million Westlink Sdn Bhd & Anor v Maybank Investment Bank Bhd & Ors and others appeals [2018] 4 MLJ 392; [2017] 1 LNS 1164, CA (refd)

SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor [2016] 1 MLJ 464; [2016] 1 CLJ 177, FC (refd)

Silver Concept Sdn Bhd v Brisdale Rasa Development Sdn Bhd (formerly known as

Ekspidisi Ria Sdn Bhd) [2005] 4 MLJ 101; [2005] 3 CLJ 259; [2005] 5 AMR 24, CA (refd)

Legislation referred to

Competition Act 2010 ss 2, 4, 4(1), (2), 10
Competition Commission Act 2010
Contracts Act 1950 ss 24, 24(a), (b), (e), 135
Control of Padi and Rice Act 1994
Customs Act 1967 s 14(2)
Evidence Act 1950 s 103
Lembaga Padi dan Beras Negara (Successors Company) Act 1994
Lembaga Padi dan Beras Negara Act 1971
Specific Relief Act 1950 ss 4(b), 18(3)

CJ Siew (Douglas Yee) for the plaintiff.
Frank Wong (Rahman Rohaida) for the defendant.

Faizah Jamaludin JC:

INTRODUCTION

[1] The dispute between the plaintiff and the defendant relates to the termination by the defendant of a contract for the importation of broken rice dated 20 April 2011 ('2011 broken rice contract').

[2] The plaintiff allege that the defendant's termination of the 2011 broken rice contract via a termination letter dated 20 November 2013 ('termination letter') was unlawful and claims for a declaration and specific performance and general damages against the defendant.

[3] For the reasons set out in this judgment, I found at the conclusion of trial that the defendant's termination of the 2011 broken rice contract was unlawful. This court granted the plaintiff's claim for a declaration that the termination of the said contract was unlawful and invalid. I also found that the facts and circumstances of this case merits the grant of specific performance as well as the award of general damages to the plaintiff for the said breach of contract.

FACTS

[4] The defendant, Padiberas Nasional Bhd ('BERNAS'), is the concession holder of the right to import rice into Malaysia under concession agreements between the defendant and the Government of Malaysia ('GOM'). Pursuant to a concession agreement with GOM dated 12 January 1996, the defendant was awarded the concession to import rice into Malaysia for a period of 15 years

until 11 January 2011 ('1996 concession agreement'). The defendant's concession to import rice was renewed in 2012, whereby GOM granted the defendant, pursuant to a new concession agreement ('2012 concession agreement'), a further right to import rice for a period of ten years commencing from the effective date stated in the 2012 concession agreement.

[5] The plaintiff, Fantasy Ruby Sdn Bhd, is a private limited company. It had entered into a contract with the defendant on 21 July 2010 for the importation of broken rice for the period from 15 June 2010–31 December 2010 ('2010 broken rice contract'). The 2010 broken rice contract was entered pursuant to an approval obtained by the plaintiff from the Ministry of Agriculture and Agrobased Industry's ('MOA') to import 35,000 tons of broken rice as contained in a letter from dated 27 May 2010 from the MOA to the defendant ('2010 MOA approval letter'). Upon the expiration of the 2010 broken rice contract, the plaintiff obtained a further approval from the MOA to import broken rice for a period of ten years. The approval is contained in a letter dated 8 March 2011 from the MOA to the plaintiff ('2011 MOA approval letter') (common bundle of documents at p 59). The salient terms of the 2011 MOA approval letter are as follows:

> 2. Sukacita dimaklumkan bahawa permohonan pihak tuan untuk menyambung pengimportan beras hancur dengan kuota sebanyak 5,000 MT sebulan bagi tempoh 10 tahun telah dipertimbangkan dan diluluskan. Walau bagaimanapun, kelulusan ini tertakluk kepada tempoh dan syarat-syarat yang terkandung di dalam perjanjian konsesi Penswastaan BERNAS serta arahan Kerajaan dari semasa ke semasa.
>
> 3. Di samping itu, pasaran beras hancur ini hanya dibenarkan untuk dijual kepada pengusaha mihun sahaja dan tidak dibenarkan dijual kepada pemborong dan peruncit.

[6] Pursuant to the 2011 MOA approval letter, the plaintiff and the defendant entered into a further contract dated 20 April 2011, for the importation of broken rice ('2011 broken rice contract') (common bundle of documents at pp 63–109).

THE 2011 BROKEN RICE CONTRACT

[7] The recital of the 2011 broken rice contract gives the background to the agreement between the parties. It states:

> A. The Government of Malaysia and BERNAS have executed a BERNAS Agreement dated 12 January 1996 whereby Article 3.1 of the Concession Agreement has stated that BERNAS has been granted the right to import rice into Malaysia for a period of fifteen (15) years which expires on 11 January 2011. At the expiry of the BERNAS Agreement, BERNAS has been granted an interim right to import rice by the Ministry of Agriculture & Agrobased Industry.

> B. In view of the broken rice insufficiency for the manufacture and production of vermicelli and/or koay teow in the country, *the Government of Malaysia has upon consultation with BERNAS agreed for PERSATUAN PENGUSAHA BEE HOON MALAYSIA (ROS Registration No. 698 Perak) … ('PPBHM') via its authorized agent FRSB [Fantasy Ruby Sdn. Bhd.] to enter into a contract with BERNAS where BERNAS will facilitate the importation of broken rice*, such quantity of broken rice which specifications are particularly described in Appendix A herein or such other specifications to be submitted to BERNAS in writing, into Malaysia from the rice exporting countries, for and on behalf of PPBHM upon the terms and conditions hereafter appearing. (Emphasis added.)

[8] Clause 2.1 of the 2011 broken rice contract, expressly states that GOM has agreed that PPBHM, via its authorised agent the plaintiff, to enter into the contract with the defendant and that the defendant:

> will facilitate and render its services for the importation of broken rice, for and on behalf of FRSB [the plaintiff] commencing from the date of this Contract which shall continue for such period until execution of the new agreement between the Parties herein upon execution of the new BERNAS Agreement.

[9] The plaintiff is referred to by its acronym 'FRSB' in the 2011 broken rice contract. The salient terms of the 2011 broken rice contract are reproduced below:

> *3 TERM*
>
> This Contract shall commence on the date of the execution hereof (hereinafter referred to as '*Commencement Date*') and shall continue for such period until successful renewal of the concession agreement by BERNAS with the Government of Malaysia. *Upon renewal of the said concession agreement, the Parties herein shall within one (1) week execute a fresh agreement in similar terms for a total period of Ten (10) years from the date of this Contract*.
>
> *4 SPECIAL CONDITIONS*
>
> The Parties hereby agree that this Contract, pursuant to the terms and subject to the conditions set out herein, is conditional upon the following:
>
> (i) Any conditions as shall be laid down by the Ministry of Agriculture & Agrobased Industry in respect of the allocation of quota of broken rice granted to FRSB which are imposed on BERNAS shall be applied back to back with FRSB in this Contract;
>
> (ii) Any change to the directives by the Government and/or Ministry of Agriculture & Agrobased Industry in relation to the broken rice importation by FRSB pursuant to the letter dated 8 March 2011 issued by the Ministry of Agriculture & Agrobased Industry, must be complied with by FRSB; (Emphasis added.)

[10] On or around 18 September 2012, GOM and the defendant executed the 2012 concession agreement.

CHRONOLOGY OF EVENTS AFTER THE 2012 CONCESSION AGREEMENT

[11] After the 2012 concession agreement was entered by GOM and the defendant, the following events took place:

DATE	EVENT
14 November 2012 (common bundle of documents at p 123)	The plaintiff emailed Puan Nazliza Mohd Nasir, the defendant's general manager/company secretary, legal and secretarial division, enquiring about the execution of a fresh agreement between the plaintiff and the defendant as stipulated in cl 3 of the 2011 broken rice contract.
19 November 2012 (common bundle of documents at pp 121–122)	Puan Nazliza replied quoting the special conditions in cl 4 of the 2011 broken rice contract and asked the plaintiff to write to the MOA to 'reconfirm and refresh' the 2011 MOA approval letter. She said: As the letter from MOA dated 8 March 2011 before the signing of the new BERNAS Agreement, it is proper that Fantasy Ruby should write to MOA again to re-confirm and refresh the said letter. This is because legally, BERNAS will only act as instructed by MOA/the Government at all times after the new BERNAS Agreement is signed since the new BERNAS Agreement supersedes any other agreement relating to the importation of rice.
20 November 2012 (common bundle of documents at pp 115–116)	The plaintiff wrote to the MOA seeking for approval for the importation of 5,000 metric ton per month of broken rice for ten years based on the 2012 concession agreement.

4 December 2012 (common bundle of documents at pp 117–118)	The MOA, through a letter signed by Datin Naimah bt Ramli, on behalf of the Chief Secretary of the MOA, replied the plaintiff's letter stating in relation to cl 3 and 4(ii) of the 2011 broken rice contract, as follows ('2012 MOA approval letter'): 2. Merujuk kepada klausa 3 dan 4 (ii) dalam Contract to Purchase Broken Rice yang ditandatangan di antara pihak tuan dengan Padiberas Nasional Berhad (BERNAS) pada 20 April 2011 yang lalu, *sukacita dimaklumkan bahawa kementerian tiada halangan untuk syarikat Fantasy Ruby Sdn Bhd (FRSB) menandatangan sebuah perjanjian baru dengan BERNAS bagi pengimportan beras hancur sebanyak 5,000 metrik tan sebulan bagi tempoh 10 tahun.* 3. Walau bagaimanapun, *kelulusan ini adalah tertakluk kepada syarat-syarat sebagaimana yang ditetapkan dalam Perjanjian Konsesi Di Antara Kerajaan dengan BERNAS bertarikh 18 September 2012 dan tarikh tamat tempoh perjanjian baru tersebut perlulah diselaraskan kepada 10 Januari 2021, iaitu tarikh tamat tempoh perjanjian konsesi yang dirujuk.* (Emphasis added.)
13 December 2012 (common bundle of documents at p 121)	The plaintiff, through its solicitors, emailed Puan Nazliza forwarding the 2012 MOA letter to the defendant and asking for draft of fresh agreement.
27 December 2012 (common bundle of documents at p 120)	The plaintiff's solicitors sent follow-up emails to Puan Nazliza asking when they can get the draft agreement from the defendant.
9 January 2013 (common bundle of documents at pp 119–120)	
16 January 2013 (common bundle of documents at p 119)	
23 January 2013 (common bundle of documents at p 119)	

23 January 2013 @ 2.58pm (common bundle of documents at p 124)	Puan Nazlina replied the plaintiff's emails stating that they are seeking further clarification from the MOA on the 2012 MOA letter.
23 January 2013 @ 3.11pm (common bundle of documents at p 124)	The plaintiff wrote asking whether the defendant had written to the MOA and asked for a copy of the letter.
23 January 2015 @ 3.13pm (common bundle of documents at p 125)	The defendant replied stating that 'It will be a discussion wt [sic] the Ministry'.
22 March 2013 (common bundle of documents at p 127)	The plaintiff wrote to Puan Nazliza asking whether there was any development since three months had passed.
24 July 2013 (common bundle of documents at pp 130–132)	The defendant wrote to the MOA stating the following: 3. Sehubungan dengan itu, kami juga ingin menarik perhatian YBhg. Dato' mengenai permohonan kuota beras hancur selama 10 tahun daripada Fantasy Ruby Sdn. ("FRSB") yang telah diluluskan oleh Kementerian. Untuk makluman YBhg. Dato' FRSB telah mengemukakan kepada BERNAS tentang kelulusan permohonan kuota beras hancur mereka oleh pihak Kementerian melalui surat Kementerian Pertanian dan Industri Asas Tasni bertarikh 8 Mac 2011 selama sepuluh (10) tahun. Lanjutan dari surat tersebut bekas YB. Menteri Dato' Noh bin Omar melalui minit beliau pada 7 April 2011, telah mengarahkan BERNAS untuk melaksanakan urusan pengimportan beras hancur tersebut bagi pihak FRSB. Sesalinan surat-surat bertarikh 8 Mac 2011 dan minit surat 7 April 2012 [sic] dilampirkan di sini). 4. Berikutan kelulusan tersebut dan arahan bekas YB. Menteri untuk memberi "Approved Permit" (AP) sementara kepada FRSB sebelum Perjanjian Konsesi BERNAS ditandatangani. BERNAS telah memasuki suatu "Contract to Purchase Broken Rice' bertarikh 20 April 2011 dengan FRSB di mana kontrak tersebut telah dilaksanakan memandangkan Perjanjian Konsesi BERNAS masih belum dimeteraikan pada ketika itu. Setelah Perjanjian Konsesi BERNAS dimeterai pada 18 September 2012, FRSB telah sekali lagi mengemukakan surat Kementerian bertarikh 4 Desember 2012 (seperti lampiran) kepada BERNAS yang menyatakan pihak Kementerian tiada halangan untuk FRSB menandatangani perjanjian baru dengan BERNAS selama

	tempoh 10 tahun sehingga 10 Januari 2021 dengan merujuk kepada klausa 3 dan 4(ii) di dalam Contract to Purchase Rice. ... 5. Kami ingin menyatakan di sini klausa-klausa 3 dan 4 inin adalah tertakluk kpeada keputusan Kementerian terhadap kedudukan surat 8 Mac 2011 selepas Perjanjian Konsesi BERNAS ditandatangani. Oleh itu, kami berpendapat surat Kementerian bertarikh 8 Mac 2011 dan 4 Disember 2012 tersebut perlu disemak dan dimansuhkan memandangkan Perjanjian Konsesi BERNAS dengan Kerajaan mengatasi (supersede) perjanjian BERNAS dengan FRSB dan sebarang pengimportan beras (termasuklah beras hancur sebagai beras bergred) oleh pihak-pihak selain BERNAS adalah tidah menepati prinsip dan terma-terma Perjanjian Konsesi tersebut. 6. Untuk makluman Y.Bhg. Dato', BERNAS sememangnya membekalkan beras hancur di dalam pasaran berdasarkan kepada permintaan daripada mana-mana pihak melalui tranaksi pembelian biasa. 7. Besarlah harapan kami agar Y.Bhg. Dato' mempertimbangkan kedudukan BERNAS di dalam perkara ini'. (Emphasis added.)
20 September 2013 (common bundle of documents at p 133)	The defendant emailed the plaintiff informing it that: BERNAS will no longer be providing the services relating to the importation of broken rice on behalf of FRSB effective 31 December 2013. We will only provide the services for Approved Permit (AP) applications and related importation for broken rice as per the current practice of shipments that will be arriving in time for inbound clearance by 31 December 2013. From 1 January 2014 onwards, if you wish to buy broken rice for local distribution, kindly place your orders through our marketing arm EDARAN BERNAS NASIONAL SDN BHD (EBN).
11 November 2013 (common bundle of documents at pp 137–139)	The MOA replied the defendant's letter dated 24 July 2013 stating, among others, as follows: 4. Kementerian Pertanian dan Asas Tani (MOA) berpandangan bahawa jika terdapat mana-mana syarikat yang berminat untuk mengimport beras, maka perkara ini dianggap sebagai urusan *Business to Business (B2B) di antara BERNAS dengan syarikat berkaitan*. Oleh yang demikian, MOA tiada halangan terhadap hasrat mana-mana syarikat yang berminat untuk menandatangani perjanjian pengimportan beras hancur dengan

	BERNAS. Ini memandangkan kesemua terma-terma yang terdapat di dalam perjanjian tersebut akan dibincangkan di antara kedua-dua pihak. 5. Memandangkan *beras hancur dikategorikan sebagai beras bergred*, maka *MOA berpandangan bahawa saranan di perenggan 4 adalah terpakai* untuk situasi tersebut. (Emphasis by MOA.)
20 November 2013 (common bundle of documents at p 140)	The defendant issued the termination letter to the plaintif terminating the 2011 broken rice contract

THE PLAINTIFF'S CASE

[12] It is the plaintiff's case that the defendant's termination of the 2011 broken rice contract based on the reasons given in the termination letter was without basis and is unlawful.

THE DEFENDANT'S CASE

[13] The defendant contends that it is entitled to terminate the 2011 broken rice contract for the reasons stated in the termination letter.

[14] In its defence, the defendant pleads that the 2011 broken rice contract is in breach of ss 4 and 10 of the Competition Act 2010 and is accordingly null, void and enforceable pursuant to s 24(a), (b) and/or (e) of the Contracts Act 1950.

[15] The defendant's counsel also submits that the non-payment of customs duties for broken rice imported through the defendant's approved permit ('AP') allows the plaintiff to evade customs duties and that this is another reason why the 2011 broken rice contract is null, void and enforceable pursuant to s 24(a), (b) and/or (e) of the Contracts Act 1950. The non-payment of customs duties was not pleaded by the defendant as a reason for the termination. The defendant's application to amend the defence to include this reason not allowed by the High Court. And its appeal against the High Court's decision was dismissed by the Court of Appeal.

[16] The defendant argues that if this court finds that the 2011 broken rice contract is null, void and enforceable pursuant to the Contracts Act 1950, the plaintiff is estopped by doctrine of *ex turpi causa non oritur actio* against the defendant, which translated into English means 'one knowingly engaged in an illegal activity may not claim damages arising out of that activity'.

ISSUES TO BE TRIED

[17] The issues to be tried before this court are as follows:

(A) whether the 2011 broken rice contract is null, void and unenforceable?

(B) whether the defendant's termination of the 2011 broken rice agreement is invalid and unlawful? and

(C) whether the plaintiff is entitled to specific performance and general damages resulting from the wrongful termination?

(A) Whether the 2011 broken rice contract is null, void and unenforceable?

[18] The plaintiff argues that the defendant cannot advance further grounds, over and above what was stated in the termination letter, to justify the termination of the 2011 broken rice contract. The plaintiff's counsel cites the Court of Appeal's decision in *Silver Concept Sdn Bhd v Brisdale Rasa Development Sdn Bhd (formerly known as Ekspidisi Ria Sdn Bhd)* [2005] 4 MLJ 101; [2005] 3 CLJ 259; [2005] 5 AMR 24, where the only reason given and reliance placed by the respondent in that case to terminate the agreement was that the third condition precedent of the sale and purchase agreement was not fulfilled. The Court of Appeal, per Abdul Kadir Sulaiman JCA delivering the majority judgment of the Court of Appeal, held that:

> the respondent could not as an afterthought invent or advance another reason as to why it sought to bring the agreement to an end at the material time in question.

[19] The defendant's counsel submits that even though the issue of non-payment of customs duties is not pleaded, the law dictates that this court must be vigilant and not provide any relief on contracts which is void under s 24 of the Contracts Act 1950. Counsel cites the case of *China Road & Bridge Corp & Anor v DCX Technologies Sdn Bhd and another appeal* [2014] 5 MLJ 1; [2014] 7 CLJ 644, where Hamid Sultan JCA in delivering the decision of the Court of Appeal said:

> [2] At the outset we must say that the trial courts must be vigilant not to provide any relief on contracts which is void on the grounds of public policy, or illegality or 'Metramac scenario', etc; whether or not it is the pleaded case of the parties or whether the issue was raised during the trial. The case of *Blay v Pollard & Morris* [1930] 1 KB 628 where Scrutton LJ observed:
>
> > Cases must be decided on the issues on the record; and if it is desired to raise other issues they must be placed on the record by amendment.

which has been followed in a number of local cases will not stand to tie the hands of judges to deal with the above issues, or arrest impropriety on its own motion at limine (see *Pertamina v Kartika Ratna Tahir & Ors* [1983] 1 MLJ 136; [1982–1983] 1 SLR 351; *Metramac Corporation Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd; Tan Sri Halim Saad & Che Abdul Daim Hj Zainuddin (interveners)* [2007] 5 MLJ 501; [2007] 4 CLJ 725).

[15] Cases such as *Janagi v Ong Boon Kiat* [1971] 2 MLJ 196 which has asserted that the court is not entitled to decide a suit on a matter on which no issue has been raised will not be applicable to tie the hands of the court on its own motion to deal with issues such as public policy or illegality, etc to ensure the public are not short changed by peddlers or touts.

[20] Section 24 of the Contracts Act 1950 provides as follows:

The consideration or object of an agreement is lawful, unless —

(a) it is forbidden by a law;

(b) it is of such a nature that, if permitted, it would defeat any law;

(c) it is fraudulent;

(d) it involves or implies injury to the person or property of another; or

(e) the court regards it as immoral or opposed to public policy.

In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

[21] The defendant did not state illegality of the 2011 broken rice contract as a reason for termination of the said contract in the termination letter. Based on the decision in *Silver Concept*, the defendant cannot advance further reasons other than that stated in the termination letter to justify the termination. However, based on the established principle of law that this court is not restricted on its own motion to consider issues of illegality, I have proceeded to consider below whether the 2011 broken rice contract is null, void and unenforceable by reason of the alleged breach of the Competition Act 2010 and non-payment of customs duty as alleged by the defendant.

(a) Is the 2011 broken rice contract in breach of the Competition Act 2010?

[22] The defendant pleads that cl 7.3 of the 2011 broken rice contract is in breach of the Competition Act 2010 ('the CA 2010'), including but not limited to ss 4 and 10 of the CA 2010. The defendant pleads in para 23.2 of the statement of claim as follows:

> 23.2 Klaus 7.3 dalam Perjanjian Beras Hancur bertarikh 20 April 2011 jelas melanggari Akta Pesaingan 2010 ['Competition Act 2010'] termasuk dan tidak terhad kepada seksyen 4 dan 10 Akta Pesaingan 2010.

[23] Clause 7.3 of the 2011 broken rice contract states as follows:

> 7.3 BERNAS shall not sell imported broken rice to any member of PPBHM in Peninsula Malaysia unless specifically directed by the Ministry of Agriculture & Agrobased Industry during the period of this Contract. For avoidance of doubt, the members of PPBHM are attached herewith as Appendix B.

[24] At the time the 2011 broken rice contract was entered between the parties, the defendant was GOM's concession holder of the right to import rice into Malaysia pursuant to the 1996 concession agreement. The plaintiff entered into the 2011 broken rice contract as the authorised agent of Persatuan Pengusaha Bee Hoon Malaysia ('PPBHM'). Recital B of the 2011 broken rice contract states as follows:

> B. In view of the broken rice insufficiency for the manufacture and production of vermicelli and/or koay teow in the country, *the Government of Malaysia has upon consultation with BERNAS agreed for PERSATUAN PENGUSAHA BEE HOON MALAYSIA (ROS Registration No. 698 Perak) … ('PPBHM') via its authorized agent FRSB [Fantasy Ruby Sdn. Bhd.] to enter into a contract with BERNAS where BERNAS will facilitate the importation of broken rice*, such quantity of broken rice which specifications are particularly described in Appendix A herein or such other specifications to be submitted to BERNAS in writing, into Malaysia from the rice exporting countries, for and on behalf of PPBHM upon the terms and conditions hereafter appearing. (Emphasis added.)

[25] An 'agent' is defined under s 135 of the Contracts Act 1950 as:

> a person employed to do any act for another or to represent another in dealings with third persons. The person for whom such act is done, or who is so represented, is called the 'principal'.

[26] Accordingly, the plaintiff entered into the 2011 broken rice contract as an agent of the PPBHM and the PPBHM is the principal.

[27] The defendant pleads that the 2011 broken rice contract had breached the CA 2010, including but not limited to ss 4 and 10 of the CA 2010.

However, as is clear from the CA 2010 there are only two prohibitions under the Act. These prohibitions are:

(a) Chapter 1 prohibition under s 4 against anti-competitive agreement; and

(b) Chapter 2 prohibition under s 10 against abuse of dominant position.

Accordingly, this court will consider the 2011 broken rice contract in the context of both these prohibitions.

[28] Malaysian Competition Commission ('MyCC') is the body empowered under the CA 2010 and the Competition Commission Act 2010 to enforce the CA 2010. The MyCC has issued guidelines in relation to the two prohibitions entitled:

(i) 'Guidelines on Chapter 1 Prohibition: Anti-Competitive Agreements' ('MyCC Guidelines on Anti-Competitive Agreements'); and

(ii) 'Guidelines on Chapter 2 Prohibition: Abuse of Dominant Position' ('MyCC Guidelines on Abuse of Dominant Position').

(i) Chapter 1 Prohibition: Is the 2011 broken rice contract Anti-Competitive?

[29] The CA 2010 came into force on 1 January 2012 after the parties had entered into the 2011 broken rice contract.

[30] The CA 2010 does not prohibit all agreements. Section 4(1) of the CA 2010 only prohibits a horizontal or vertical agreement between enterprises which 'has the object or effect of *significantly* preventing, restricting or distorting competition in any market for goods or services'.

[31] Section 4(2) of the CA 2010 states that:

> Without prejudice to the generality of subsection (1), a *horizontal agreement* between enterprises which has the object to —
>
> (a) fix, directly or indirectly, a purchase or selling price or any other trading conditions;
>
> (b) share market or sources of supply;
>
> (c) limit or control —
>
> (i) production;
>
> (ii) market outlets or market access;
>
> (iii) technical or technological development; or
>
> (iv) investment; or

(d) perform an act of bid rigging,

is deemed to have the object of significantly preventing, restricting, or distorting competition in any market for goods or services.

[32] Section 2 of the CA 2010 defines:

'Enterprise' as 'any entity carrying on commercial activities relating to goods or services ...'

'Horizontal agreement' as '*an agreement between enterprises each of which operates at the same level in the production or distribution chain*'.

'Vertical agreement' as '*an agreement between enterprises each of which operates at a different level in the production or distribution chain*'.

[33] The word 'significantly' is not defined in the CA 2010.

[34] The MyCC Guidelines on Anti-Competitive Agreements state that 'significant' means the agreements 'must have more than a trivial impact'. It states the following:

3.1 Section 4 of the Act sets out the prohibited agreements as follows (emphasis added):

Section 4(1) of the Act

Section 4(1): A horizontal *or* vertical agreement between enterprises is prohibited insofar as the agreement has the *object or effect* of *significantly* preventing, restricting or distorting competition in any market for goods or services.

3.2. So both *horizontal agreements* (between enterprises at the same level of production, which normally means competitors in the same market) and *vertical agreements* (between buyers and sellers at different stages of the production and distribution chain) are prohibited if they have an anti-competitive object or effect which is significant on the market.

...

3.4 In general, 'significant' means the agreements must have more than a trivial impact. It should be noted that impact would be assessed in relation to the identified relevant market. A good guide to the trivial impact of an anti- competitive agreement might be the combined market share of those participating in such an agreement. As a starting point and to provide greater certainty, the MyCC may use the following basis in assessing whether an anti- competitive effect is 'significant.' This approach sets 'safe harbours' for otherwise anti-competitive agreements or association decisions. In general, anti-competitive agreements will not be considered 'significant' if:

° *the parties to the agreement are competitors who are in the same market* and *their combined market share of the relevant market does not exceed 20%*;

° the parties to the agreement are not competitors and *all of the parties*

individually has less than 25% in any relevant market. For example, an exclusive distribution agreement between a wholesaler and a retailer neither of whom has more than 25% of the wholesale market or retail market.

[35] I find that the 2011 broken rice contract is not an anti-competitive agreement and is not in breach of s 4 of the CA 2010 for the following reasons:

(a) the 2011 broken rice contract is not a 'horizontal agreement' between the parties under the CA 2010. This is because the plaintiff and the defendant are not enterprises that operate at the same level in the production or distribution chain. The defendant is the importer of rice into Malaysia pursuant to its 1996 concession agreement with GOM. The plaintiff entered the 2011 broken rice contract as the authorised agent of the PPBHM. Under s 135 of the Contracts Act 1950, the principal to the 2011 broken rice contract is PPBHM. PPBHM is an association of *bee hoon* manufacturers. It is not an importer of rice like the plaintiff;

(b) the object and purpose of the 2011 broken rice contract is for the defendant to import broken rice from rice exporting countries for and on behalf of PPBHM on the terms and conditions of the 2011 broken rice contract;

(c) the object of the 2011 broken rice contract is not an activity which is deemed under s 4(2) of the CA 2010 to have 'the object of significantly preventing, restricting, or distorting competition in any market for goods or services'. This is because it is not an agreement with the object of fixing prices; sharing markets or sources of supply; limiting or controlling production, market outlets or market access, technical or technological development or investment; or bid-rigging;

(d) the 2011 broken rice agreement is a 'vertical agreement' between the plaintiff and the defendant. It is an agreement between the importer of rice and the manufacturers of *bee hoon*. Both the plaintiff and the defendant are 'enterprises each of which operates at a different level in the production or distribution chain';

(e) the plaintiff and the defendant do not operate in the same market. The plaintiff's market is the manufacture of bee hoon. The defendant's market is the importation of rice. No evidence was adduced during the trial as to whether they are competitors in the same market. Neither was any evidence adduced as to what the plaintiff's and the defendant's market shares are in their respective relevant markets. Pursuant to the MyCC Guidelines on Anti-Competitive Agreements, the MyCC will consider an anti-competitive agreement to be 'significant' if:

(i) the parties to the agreement are competitors in the same market and

their combined market share is more than 20%; and

(ii) where the parties are not competitors in the same market and their market share individually in the relevant market is 25% or more;

(f) Therefore, pursuant to the *MyCC Guidelines on Anti-Competitive Agreements*, the agreement would not be considered to have a 'significant' impact under the CA 2010.

(ii) Chapter 2 Prohibition: Is 2011 broken rice contract in breach of s 10 of the CA 2010?

[36] The defendant also pleads that the 2011 broken rice contract is in breach of s 10 of the CA 2010. Section 10 of the CA 2010 prohibits abuse of dominant position.

[37] Section 10 of the CA 2010 states that:

> An enterprise is prohibited from engaging, whether independently or collectively, in any conduct which amounts to an abuse of a dominant position in any market for goods or services.

[38] 'Dominant position' is defined in s 2 of the CA 2010 as:

> a situation in which one or more enterprises possess such significant power in a market to adjust prices or outputs or trading terms, without effective constraint from competitors or potential competitors.

[39] The MyCC Guidelines on Abuse of Dominant Position state that:

> 1.2. In assessing whether there has been a breach of Chapter 2, the MyCC will proceed in two stages:
>
> ° firstly, the MyCC will ask whether the enterprise being complained about is dominant in a relevant market in Malaysia; and
>
> ° if the enterprise is dominant, then the MyCC will assess whether the enterprise is abusing that dominant position.
>
> 2. HOW WILL THE MYCC DETERMINE DOMINANCE
>
> 2.1 An enterprise shall be dominant (whether as a supplier or a buyer) if it has significant market power in a relevant market in Malaysia. To assess whether an enterprise is dominant, first the relevant market must be defined in accordance with the MyCC's Guidelines on Market Definition. This involves determining both:
>
> ° the relevant product market; and
>
> ° the relevant geographic market.

2.2 In general, the MyCC will consider a market share above 60% to be indicative that an enterprise is dominant. (Please refer to para 2.9 to para 2.13 in the next few pages.)

2.3 Once the relevant market has been defined, the MyCC will determine whether an enterprise has a dominant position.

[40] Section 10 of the CA 2010 prohibits an enterprise that in a dominant position from abusing that dominant position. The defendant did not plead that either or both the plaintiff and/or the defendant had dominant positions in their respective markets or that either had abused their dominant position by entering into the 2011 broken rice contract.

[41] The defendant also did not adduce any evidence in court during the trial to prove that either or both the plaintiff and/or the defendant were: (i) dominant in their respective markets; and (ii) that they had abused that dominant position.

[42] Under s 103 of the Evidence Act 1950, the burden is on the defendant to prove that first, the plaintiff or defendant was (or both were) in a dominant position in their respective markets; and secondly, that either or both of them had breached that dominant position in executing the 2011 broken rice contract.

[43] Accordingly, I find the defendant had failed to prove on a balance of probabilities that either the plaintiff or the defendant had breached s 10 of the CA 2010 in entering into the 2011 broken rice contract.

[44] For the reasons discussed above, I find that the 2011 broken rice contract is not in breach of s 4 of the CA 2010 and the parties had not breached s 10 of the CA 2010 by entering into the 2011 broken rice contract.

(b) Does non-payment of customs duties by the plaintiff for broken rice imported by BERNAS for and on behalf of the plaintiff render the 2011 broken rice contract unlawful?

[45] The defendant submits that the 2011 broken rice contract is unlawful because its claims that the purpose and object of the plaintiff entering into the 2011 broken rice contract is to enable the plaintiff to import broken rice through the defendant's AP without having to pay customs duties and 'that the plaintiff was aware that the defendant was given special privilege tax exemption for all rice and grain products imported and such privilege was only meant for the defendant' (para 6.3.2 of the *hujahan bertulis defendan*). Per the letter of exemption from the Ministry of Finance to the defendant dated 11 January

2011, the defendant is exempted under s 14(2) of the Customs Act 1967 from all import duty for all types of rice imported by the defendant from 1 January 2011–31 December 2015 (common bundle of documents at p 58).

[46] As is clear from recitals A and B of the 2011 broken rice contract, the defendant was granted the concession to import rice into Malaysia pursuant to the 1996 concession agreement and at the expiry of the 1996 concession agreement, the defendant was granted an interim right to import rice by the MOA. Pursuant to the 2011 broken rice contract, GOM in consultation with the defendant agreed for PPBHM through its authorised agent, the plaintiff, to enter into the 2011 broken rice contract with the defendant where the defendant will facilitate the importation of broken rice for and on behalf of PPBHM upon the terms and conditions of the 2011 broken rice contract.

[47] Padi and rice are controlled items. The importation of rice into Malaysia is subject to the Control of Padi and Rice Act 1994. The properties, rights and liabilities of Lembaga Padi dan Beras Negara ('LPN') (the statutory body established under the Lembaga Padi dan Beras Negara Act 1971) were transferred and vested to the defendant pursuant to the Lembaga Padi dan Beras Negara (Successors Company) Act 1994.

[48] Only the defendant has the right to import rice into Malaysia pursuant to the 1996 concession agreement, the interim right granted by the MOA as stated in Recital A of the 2011 broken rice contract and the 2012 concession agreement. Neither PPBHM nor the plaintiff has the right to import rice directly in Malaysia.

[49] Accordingly, the plaintiff in order to import broken rice on behalf of PPBHM into Malaysia has to do so through the defendant.

[50] Pursuant to the terms of the 2011 broken rice agreement, the plaintiff has to pay the defendant consideration in the form of an administrative fee of RM50 per metric tonne of broken rice imported. Clause 5 of the 2011 broken rice contract, inter alia, state that in consideration of the defendant making available its resources to facilitate the importation of broken rice by the defendant for and on behalf of the plaintiff, the plaintiff has to pay an administrative fee to the defendant within 30 days from the date of the invoices issued by the defendant to the plaintiff. The 'administrative fee' is defined as:

> the Administrative Fee payable to BERNAS by FRSB at the rate of Ringgit Malaysia (RM50.00) only per metric tonne of the Product excluding service tax (if applicable) in consideration of the services rendered by BERNAS under this Contract (cl 1.1 of the broken rice contract).

The fee is payable to the defendant based on the approved weight of stated in each bill of lading.

[51] The plaintiff also has to provide a bank guarantee/security deposit to the defendant in the sum of Ringgit Malaysia two hundred and fifty thousand (RM250,000) to secure the plaintiff's performance under the 2011 broken rice contract. Clause 5.3 of the 2011 broken rice contract states as follows:

> 5.3 In order to ensure the due performance of FRSB's obligations under this Contract, FRSB shall, upon signing of this Contract, provide a bank guarantee/security deposit which amounts to Ringgit Malaysia Two Hundred Fifty Thousand (RM250,000.00) only in favour of BERNAS. The said amount will be refundable upon termination or expiry of this Contract, free of interest, in the event of there being no outstanding claim against FRSB by BERNAS. BERNAS shall however be entitled to appropriate or adjust any amount which may be due to it from FRSB out of the security deposit.

[52] Accordingly, for the above reasons, I find that the defendant's submission that the object and purpose of the 2011 broken rice agreement is for the plaintiff to avoid paying customs duty to be devoid of merit. Pursuant to the Control of Padi and Rice Act 1994 read together with the Lembaga Padi dan Beras Negara (Successors Company) Act 1994, the 1996 concession agreement and the interim agreement granted by the MOA pending the entering of the 2012 concession agreement, only the defendant had the right (and continues to have the right) to import rice into Malaysia. It would have been illegal and it remains illegal for the plaintiff or any party, other than the defendant, to import rice into Malaysia. The plaintiff had to enter into the 2011 broken rice agreement with the defendant for the latter to facilitate the importation of broken rice for the members of PPBHM. As is expressly stated in the 2011 broken rice agreement, the consideration for the defendant's facilitation services is an administrative fee of RM50 per metric tonne of broken rice imported for and on behalf of the plaintiff, payable by the plaintiff to the defendant. And the plaintiff's performance under the 2011 broken rice contract was secured by the plaintiff's provision of a bank guarantee/security deposit in the sum of RM250,000 to the defendant.

FINDING

[53] For the reasons above, I find that the 2011 broken rice contract is not null, void and unenforceable pursuant to the Contracts Act 1950. Accordingly, I find the 2011 broken rice contract is a valid and binding agreement on the parties.

(B) Whether the defendant's termination of the 2011 broken rice agreement is invalid and unlawful?

[54] The express reason given by the defendant for terminating the 2011 broken rice contract is that since none of the conditions stipulated in the 2012 concession agreement have arisen, the defendant has the right to terminate the 2011 broken rice contract with immediate effect. The contents of the termination letter and cl 9 March of the 2011 broken rice contract are reproduced below:

(a) termination letter:

> Pursuant to Clause 3 of the said Agreement, parties were to execute a fresh agreement for a period of Ten (10) years from the date of the said Agreement of the renewal of the Concession Agreement between BERNAS and the Government of Malaysia.
>
> Unfortunately, the new Concession Agreement entered between BERNAS and the Government of Malaysia clearly stipulates that the Government of Malaysia will only allow a 3rd party to import rice into Malaysia subject to the following conditions:
>
> (b) there exists a state of Emergency;
>
> (c) there is a serious shortage or instability of the supply of rice in Malaysia;
>
> (d) there exists a serious instability in the price of rice in Malaysia;
>
> (e) it is in the public interest or the nation's interest; or
>
> (f) BERNAS fails to perform its social obligations as provided in Clause 4.1 of the Concession Agreement.
>
> Since none of the above conditions have arisen here, we are unable to proceed to enter into a fresh agreement with you. Accordingly, we invoke Clause 9 March of the said Agreement and hereby terminate the said Agreement with immediate effect.

(a) cl 9.3 of the 2011 broken rice contract:

> In the event there are no instructions or confirmations from the Government and/or Ministry of Agriculture & Agrobased Industry *to proceed or continue with the importation of broken rice with FRSB after BERNAS or FRSB exhausts all avenues within the Parties' contro*l, the Contract may be terminated by either BERNAS or FRSB and no party shall be responsible and/or liable for any indirect or consequential damages or losses including but not limited to loss of revenue, loss of anticipated savings or loss or profits howsoever arising under or in connection with termination of this Contract save and except for any antecedent breach. (Emphasis added.)

[55] The defendant's counsel submits that as GOM and MOA did not determine or confirm the existence or the circumstances under cl 3 of the 2012 concession agreement, which circumstances would allow GOM to give rights to a third party to import rice, it is right for the defendant to terminate the 2011 broken rice contract pursuant to cl 9.3.

[56] The facts show that the 2011 broken rice contract was entered between the plaintiff and the defendant after approval was given by GOM, through the MOA, in the 2011 MOA approval letter.

[57] Notwithstanding the fact that: (i) the terms of the 2011 MOA approval letter approved the importation of 5,000 MT per month of broken rice for a period of ten years; and (ii) the 2011 broken rice contract expressly stated that within one week of the renewal of the 2012 concession agreement, the plaintiff and the defendant are to enter into a fresh agreement on similar terms for a total period of ten years from the date of the 2011 broken rice contract, the defendant in their email dated 19 November 2012 asked the the plaintiff to write to the MOA to 'reconfirm and refresh' the 2011 MOA approval letter.

[58] The plaintiff duly did so. The MOA in their reply dated 4 December 2012 to the plaintiff, confirmed that it had no objection ('tiada halangan') to the plaintiff executing a fresh agreement with the defendant for the importation of 5,000 metric ton per month of broken rice for a period of ten years. The MOA went on to state that this approval ('kelulusan ini') is subject to the terms of the concession agreement between GOM and BERNAS dated 18 September 2012 (ie the 2012 concession agreement) and the expiry date of the fresh agreement is to be in line with 10 January 2021, which is the expiry date of the said concession agreement.

[59] The plaintiff forwarded the 2012 MOA approval letter to the defendant on 13 December 2012.

[60] As the chronology of events in para [11] above shows, the defendant, approximately seven months after receiving the 2012 MOA approval letter, on 24 July 2013 wrote to the MOA stating that in the defendant's opinion the MOA must review and revoke ('perlu disemak dan dimansuhkan') the 2011 MOA approval letter and the 2012 MOA approval letter because the 2012 concession agreement supersedes any agreement between the plaintiff and the defendant.

[61] On 11 November 2013, the MOA replied the defendant's letter of 24 July 2013 stating in para 4 of its reply that in the MOA's view if any company is interested in importing rice, such matter is a business to business (B2B) matter between the defendant and the said company. The MOA went on to state that it does not have any objection for any company to enter into an agreement with the defendant for the importation of broken rice since all the terms in the said agreement will be discussed between both parties.

[62] It is clear from the plain reading of cl 3 of the 2011 broken rice contract that the plaintiff and the defendant had agreed that within one week of the

execution of the 2012 concession agreement, the plaintiff and the defendant would enter into a fresh agreement on similar terms as the 2011 broken rice contract for a period of ten years from the date of the said contract. The 2011 broken rice contract is an interim agreement between the parties pending the execution of the 2012 concession agreement between GOM and the defendant.

[63] The 2011 broken rice contract (per cl 4) is conditional: on (i) any conditions laid down by the MOA in respect of the allocation of broken rice granted to the plaintiff, which are applied on the defendant will be applied on a back to back basis in the 2011 broken rice contract; and (ii) any change in GOM's or MOA's directives in relation to the importation of broken rice by the plaintiff pursuant to the 2011 MOA approval letter must be complied with by the plaintiff.

[64] It is clear from the 2012 MOA approval letter that there is no change in directives by either the GOM or MOA on the plaintiff's importation of broken rice. In fact, when expressly asked by the defendant to review and revoke the approval given to the plaintiff pursuant to the 2011 MOA approval letter and the 2012 MOA approval letter, the MOA informed the defendant in its letter of reply that it does not have any objection for any company to enter into an agreement with the defendant for the importation of broken rice since all the terms in the said agreement will be discussed between both parties. The MOA also stated in its reply to the defendant that if any company is interested in importing rice, such matter is a business to business (B2B) matter between the defendant and the said company.

[65] Notwithstanding the MOA's refusal to revoke the 2011 MOA approval letter and the 2012 MOA approval letter, the defendant issued the termination letter about one and half weeks after receiving the MOA's reply. The termination was made pursuant to cl 9.3 of the 2011 broken rice contract.

[66] In my view, the termination pursuant to cl 9.3 is clearly without basis. From the plain reading of the cl 9.3 of the 2011 broken rice contract, the said clause can only be invoked:

> in the event there are no instructions or confirmations from the Government and/or Ministry of Agriculture & Agrobased Industry to proceed or continue with the importation of broken rice with FRSB after BERNAS or FRSB exhausts all avenues within the Parties' control.

[67] However, the reason for the termination in the termination letter is the 'non-fulfilment of conditions stipulated in Clause 3 March 1 of the New Concession Agreement'.

[68] Also, the MOA had confirmed in the 2012 MOA approval letter that it had no objections for the plaintiff to sign a fresh agreement with the defendant for the importation of 5,000 metric ton per month of broken rice for a period of ten years. In fact, the MOA when faced with an express request from the defendant to review and revoke the approval given to the plaintiff, expressly stated that it has no objections for any company entering into an agreement with the defendant for the importation of broken rice.

[69] I agree with the plaintiff's counsel that the express reason stated in the termination letter does not give rise for the defendant a right to invoke cl 9 March of the 2011 contract for broken rice. In *DC Contractor Sdn Bhd v Universiti Pertahanan Nasional Malaysia* [2014] 11 MLJ 633; [2015] 2 CLJ 946; [2014] AMEJ 0764, the High Court held that when the termination of a contract is not in accordance with the terms and conditions agreed in the contract, the termination is invalid and ineffective. Mary Lim J (as Her Ladyship then was) said:

> [76] Since the breaches mentioned in this notice of breach differ from those found in the letters of warning, it is the court's findings that the termination is bad and not in accord with cl 51. *When the termination is not in accordance with the terms and conditions agreed between the parties as found in cl 51, the termination is invalid and ineffective — see Court of Appeal's decision in Pernas Construction Sdn Bhd v Syarikat Rasabina Sdn Bhd* [2004] MLJU 759; [2004] 3 AMR 635. (Emphasis added.)

[70] The High Court in *DSL Development Corp Sdn Bhd v Kampong Kita Sdn Bhd* [2014] 11 MLJ 935; [2013] 2 ACMR 197 held that:

> [38] Having made that observation, it is apparent from the contents of both the letters of termination, especially that found in letter dated 20 December 2011; *I further do not find the termination being in accord with cl 25. None of the reasons relied on by the defendant (be it the expiry of the licence or the blacklisting by the Ministry) is within any of the terms and conditions in cl 25.1. That being so, the defendant has no right to terminate the JVA*. If at all, the defendant's remedy lies in damages.
>
> [39] *Under such circumstances, the termination is invalid.* The defendant has no right of termination for the reasons that are cited in the JVA. (Emphasis added.)

[71] Furthermore, contrary to what was stated in the termination letter, under the 2011 broken rice contract, it is not the plaintiff who is importing the broken rice into Malaysia. The terms of the said contract expressly state that it is the defendant who is importing the rice for and on behalf of the plaintiff pursuant to the terms and conditions of the 2011 broken rice contract.

[72] Therefore, the issue of a third party importing rice into Malaysia does not arise under the 2011 broken rice contract.

[73] The 2012 concession agreement was never produced in court during the trial. The defendant only produced sub-cll 3.1, 3.3.1 and 3.3.2 of the 2012 concession agreement. The defendant's witness, Mohd Khusaini bin Harun ('SD2') claimed that he has personal knowledge of the 2012 concession agreement. However, during the trial, SD2 testified that he was only involved in internal discussions before the defendant negotiated the terms or the 2012 concession agreement with MOA. SD2 said that he was not involved in the external negotiations with the MOA and he was not the maker of the 2012 concession agreement. For this reason, copies of the said subclauses were not admitted as evidence and remained as ID during the trial.

[74] It is trite law that no term or clause of a contract can be interpreted or construed in isolation of the rest of the contract. The Federal Court in *SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor* [2016] 1 MLJ 464; [2016] 1 CLJ 177, per Zainun Ali FCJ held that:

> [41] Thus in addition to the above in interpreting the contract, the court must approach it holistically. *No term is to be taken or interpreted in isolation. This canon of construction is so long established, it is almost banal*. See for instance *Chamber Colliery Ltd v Twyerould* [1915] 1 Ch 268 (Note):
>
> > ... the application of the well-known (sic) rule that a deed ought to be read as a whole, in order to ascertain the true meaning of its several clauses; and that the words of each clause should be so interpreted as to bring them into harmony with the other provisions of the deed, if that interpretation does no violence to the meaning of which they are naturally susceptible.
>
> [42] This is further reinforced by Lord Mustill in *Charter Reinsurance Co Ltd v Fagan* [1997] AC 313 at p 384, where His Lordship stated that 'the words (to be interpreted) must be set in the landscape of the instrument as a whole'. (Emphasis added.)

FINDINGS

[75] For the reasons stated above, I find that the defendant's termination of the 2011 broken rice contract is not in accordance with the terms and conditions of the 2011 broken rice contract. Accordingly, I find that the defendant's termination of the 2011 broken rice contract is invalid and unlawful.

(C) Whether the plaintiff is entitled to specific performance and general damages resulting from the wrongful termination?

[76] Having found that: (a) the 2011 broken rice contract is not null, void or unenforceable; and (b) the defendant's termination of the said contract is invalid and unlawful, the final issue to be decided by this court is whether the plaintiff is entitled to specific performance as well as general damages to be

assessed for the wrongful termination of the 2011 broken rice contract.

[77] This court is empowered under the Specific Relief Act 1950 ('the SRA 1950'), s 4(b) 'to order a party to do the very act which is he is under an obligation to do'. Further, s 18(3) of the SRA 1950 stipulates that:

> (3) If in any such suit the court decides that specific performance ought to be granted, but that it is not sufficient to satisfy the justice of the case, and that some compensation for breach of the contract should also be made to the plaintiff, it shall award him such compensation accordingly.

[78] The power of the court under the SRA 1950 to grant specific performance as well as an order for compensation for breach of contract is confirmed by Court of Appeal in *Million Westlink Sdn Bhd & Anor v Maybank Investment Bank Bhd & Ors and others appeals* [2018] 4 MLJ 392; [2017] 1 LNS 1164, where Harmindar Singh JCA in delivering the decision of the Court of Appeal held that:

> [39] In any case, s 18 of the SRA 1950 permits the court to order compensation for breach of contract, in addition to, or in substitution, to a person seeking specific performance. Section 18, shorn of the illustrations, is reproduced as follows:
>
> 18 Power to award compensation in certain cases
>
> (1) Any person suing for the specific performance of a contract may also ask for compensation for its breach, either in addition to, or in substitution for, its performance.
>
> (2) If in any such suit the court decides that specific performance ought not to be granted, but that there is a contract between which has been broken by the defendant and that the plaintiff is entitled to compensation for that breach, it shall award him compensation accordingly.
>
> (3) If in any such suit the court decides that specific performance ought to be granted, but that it is not sufficient to satisfy the justice of the case, and that some compensation for breach of the contract should also be made to the plaintiff, it shall award him such compensation accordingly.
>
> (4) Compensation awarded under this section may be assessed in such manner as the court may direct.
>
> (5) The circumstance that the contract has become incapable of specific performance shall not preclude the court from exercising the jurisdiction conferred by this section.

[79] Clause 3 of the 2011 broken rice contract clearly states that the plaintiff and the defendant are to execute a fresh agreement on similar terms to the 2011 broken rice contract for a period of ten years from the date of the said 2011

contract within one week of GOM and the defendant entering into a new concession agreement. GOM and the defendant successfully entered into the new concession agreement namely, the 2012 concession agreement. However, the defendant in breach of the express terms of the 2011 broken rice contract refused to enter into a fresh agreement with the plaintiff and unlawfully terminated the 2011 broken rice contract.

[80] In my view, the facts show that the defendant had 'strung the plaintiff along' since 14 November 2012 ie when the plaintiff first asked when the fresh agreement will be signed. Even after the plaintiff had forwarded the defendant the 2012 MOA approval letter, the defendant, instead of signing the fresh agreement, wrote to the MOA asking the Ministry to 'review and revoke' the approvals it had given to the plaintiff under the 2011 MOA approval letter and the 2012 MOA approval letter. When the MOA refused to revoke both approvals but instead confirmed that it had no objection to any company entering into an agreement for the importation of broken rice with the defendant, the defendant proceeded to issue the termination letter terminating the 2011 broken rice contract.

[81] The termination letter was issued approximately two months after the defendant had notified the plaintiff that it would cease to provide services in relation to the importation of broken rice on behalf of the plaintiff and nine days after it had received the reply from the MOA.

[82] The termination is a clear breach of the terms of the 2011 broken rice contract. As stated above, rice is a controlled item under the Control of Padi and Rice Act 1994 and the defendant is the only entity that has been granted a concession to import rice into Malaysia by GOM. The plaintiff would, therefore, not be able import broken rice without entering into the fresh agreement with the defendant as stipulated in the 2011 broken rice contract.

[83] Under the terms of the 2011 broken rice contract, the plaintiff had to purchase the rice from suppliers overseas and make the necessary shipping arrangements to ship the broken rice to Malaysia. Therefore, it would have suffered loss and damages as a result of the unlawful termination of the 2011 broken rice contract, including costs of terminating any existing supply agreements with the foreign broken rice suppliers as it was no longer able to import the broken rice into Malaysia upon the defendant's wrongful termination of the 2011 broken rice contract.

DECISION

[84] For the reasons above, this court hereby declares that the defendant's termination of the 2011 broken rice contract through its termination letter

dated 20 November 2013 as unlawful and invalid.

[85] This court also finds that the plaintiff is entitled to the relief of specific performance. The defendant is hereby ordered to enter into a fresh agreement with the plaintiff on the terms of the 2011 broken rice agreement within one week from 27 February 2018.

[86] For the reasons discussed above, I also find that specific performance is not sufficient to do justice for the defendant's breach of the 2011 broken rice contract and accordingly order that compensation be awarded to the plaintiff in the form of general damages. The general damages shall be assessed and paid by the defendant to the plaintiff.

[87] Costs of RM25,000 is awarded to the plaintiff and is to be paid by the defendant to the plaintiff subject to the payment of the allocator fee.

ORDER

[88] So ordered accordingly.

Order accordingly.

Reported by Dzulqarnain Ab Fatar